

EXHIBIT D

COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE HARRY R. SHEPPARD, JUDGE

DEPARTMENT NO. 511

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CORNELIUS LOPES and TERESA LOPES,

Plaintiffs,

No. HG06-260161

vs.

FREMONT FREEWHEELERS, et al.,

Defendants.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

TUESDAY, JULY 17, 2007

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HAYWARD HALL OF JUSTICE

HAYWARD, CALIFORNIA

A P P E A R A N C E S

For the Plaintiffs: PATRICIA A. TURNAGE
Attorney at Law

For the Defendants: DAVID I. DALBY
DAVID L. WINNETT
Attorneys at Law

REPORTED BY: CINDY A. MORENO, CSR No. 4178

1 TUESDAY, JULY 17, 2007

2 PROCEEDINGS

3 ---oOo---

4 THE COURT: We're on the record outside the presence
5 of the jury.

6 Plaintiff has filed a motion to amend the complaint,
7 adding three additional causes of action plus a prayer for
8 punitive damages.

9 I have reviewed the moving papers and the opposing
10 papers that have been filed this morning, and I have reviewed
11 those.

12 Is there further argument by either side on this
13 issue -- on these issues?

14 MS. TURNAGE: Well, Your Honor, it seems that one of
15 the focuses of the defendants is the litigation privilege, and
16 the cases that I have quickly read that they have provided to
17 the Court have to do with defamation and also whether or not
18 the proceedings are protected. And I would agree that any
19 statements that were made by the cyclists in the criminal
20 trial are privileged. Plaintiffs do not quarrel with that.
21 But the authorities that they have provided to the Court are
22 not on point with what we have here.

23 The -- um, the authorities did not elicit the
24 e-mails from the cyclists. They basically volunteered them at
25 a time that they clearly knew that no one knew how that
26 accident happened. And someone even allowed the statements
27 of -- that my client punched a cyclist purporting to be an
28 eyewitness, and there was no eyewitness to this. There has

1 been no evidence or testimony in this trial as to an
2 eyewitness of this accident, and to allow -- Jason Sage
3 testified that he had a copy of the police report, and he knew
4 that those facts were not true, and yet they went ahead and
5 allowed Mr. Lopes to be prosecuted.

6 And from that, a jury could infer malice, which then
7 does not protect the speech and the conduct of the defendants.
8 And the case that the defendants relied upon, which was
9 *Beroiz, B-E-R-O-I-Z, versus Wall*, and it's a 2000 Cal App 2d
10 District Court case, I believe it's found at 84 Cal App 4th
11 485, is not on point because it clearly says that it has to be
12 made in good faith and without malice. Otherwise, the
13 protection of privilege is not afforded.

14 And the fact that the statements in the e-mails to
15 the police were -- had some connection or logical relationship
16 to the crimes that were being charged, that Mr. Lopes was
17 being charged with is not sufficient; and that is, um, *Rothman*
18 *versus Jackson*, 49 Cal App 4th 1134, upon which the defendants
19 relied in opposition to this motion. And the Court is saying
20 that similarity to litigation is not enough to have the
21 privilege attach.

22 And the other cases that they rely on, *Deaf Audio,*
23 *Inc., versus Rosen, Feldmire and Sisman*, 47 Cal App 4th 777,
24 has to do with defamation and absolute privilege for
25 publication or broadcast made in any legislative, judicial, or
26 other proceeding authorized by law. That case is similarly
27 not applicable to this motion.

28 The rest of plaintiffs' arguments are set forth in

1 plaintiffs' motion. And the plaintiffs would ask to direct
2 the Court's attention to *Sandoval*, which is almost on all
3 fours of this case, where the bar patrons knew that the
4 defendant in a criminal proceeding was not clearly to be
5 prosecuted, and they continued to prosecute, allow that person
6 to be prosecuted; and the Supreme Court reversed and said the
7 malicious prosecution had been stated.

8 In this case, the unsolicited e-mails from the -- to
9 the District Attorney through the police is evidence of the
10 plan for the cyclists to continue prosecution. We're not
11 focusing on the initial statements, but the fact that they
12 voluntarily, and without being asked, put together e-mails and
13 sent those to the police, urging the police to send them to
14 the District Attorney and have my client prosecuted, would be
15 the factual evidence that is before the jury as to malice.

16 And then Mr. Sage also testified about he had been
17 in touch with the District Attorney six times, and I think the
18 jury can infer from that what they will as to why he was in
19 touch with them. He certainly is a paralegal. He knows the
20 ins and outs of criminal -- of the law and the burdens of
21 proof, and I have set that forth in plaintiffs' papers.

22 **THE COURT:** All right. Mr. Dalby?

23 **MR. DALBY:** Actually, Mr. Winnett is going to handle
24 the argument, Your Honor.

25 **THE COURT:** All right, Mr. Winnett.

26 **MR. WINNETT:** Thank you, Your Honor. I'll try to
27 confine my comments to those made by Ms. Turnage this morning.

28 We do believe that our opposition brief largely

1 states the argument that we would hope to make here today.
2 And I acknowledge that Ms. Turnage has not had a full
3 opportunity to read the three cases that we had submitted this
4 morning.

5 Respectfully, I disagree with Ms. Turnage as regards
6 to the *Beroiz* case, B-E-R-O-I-Z, 84 Cal App 4th 485. In that
7 case, as in many of the cases I read last night, there is a
8 comparison of the absolute litigation privilege with a
9 qualified litigation privilege. And this case, like the Lopes
10 case we're trying currently, determined that the absolute
11 litigation privilege applied to testimony or statements that
12 the defendants gave to criminal authorities who were
13 conducting criminal investigations.

14 I have highlighted the pertinent passages on Page 8
15 and 9 of the opinion.

16 But essentially, what this case is about is people
17 in Mexico suing other people in Mexico, in a California court,
18 and there was a question of the defendants having made reports
19 to Mexican authorities of alleged criminal activity by the
20 plaintiffs. And the question was, does a Mexican court
21 provide the same -- a Mexican criminal investigation and court
22 proceeding provide the same constitutional protections that
23 are afforded by a criminal proceeding in the state of
24 California?

25 We contend that all of the constitutional safeguards
26 provided by California courts were afforded to Mr. Lopes. He
27 went through a criminal trial before a jury of his peers. He
28 was cloaked in the requirement that he be proven guilty beyond

1 a reasonable doubt. Because those constitutional safeguards
2 were in place, the absolute litigation privilege applies to
3 the conversations that the members of the bicycling club had
4 with one another and with the police prior to the institution
5 of the criminal charges. This case is right on point.

6 As for Ms. Turnage's repeated statement not only
7 today, but throughout her brief, that Mr. Sage testified there
8 were no eyewitnesses to the event, it's like she's been in a
9 different trial, Your Honor. We outlined all of the witnesses
10 who were direct eyewitnesses within our brief: Mr. Geisert,
11 Mr. Chuck, Mr. Parker, Mr. Upthegrove, and, most recently,
12 Mr. Rosa, who watched the entire thing happen right in front
13 of him.

14 Plaintiffs' arguments seem to be based on the idea
15 that the criminal complaint against Mr. Lopes charged him with
16 punching someone. It doesn't. I grabbed my exhibits last
17 night as I was going through this motion. The criminal
18 complaint is Defendants' Exhibit 531, and the charges against
19 Mr. Lopes are that he committed a battery in that he willfully
20 and unlawfully used force and violence upon the person of
21 Lloyd Rath and willfully and unlawfully used force and
22 violence upon the person of Bob Parker. That isn't dependent
23 upon a finding that there was a punch. He ran into them.
24 That's force and violence.

25 So I just don't understand how plaintiff tries to
26 say, because Officer Wren recorded that one witness who didn't
27 testify in this courtroom claims to have seen a punch, means
28 that this was all fabricated, I don't know where that comes

1 from. I respectfully submit that that is an absolute
2 misstatement of the witness -- the evidence that has gone
3 before this jury.

4 The remaining two points, Ms. Turnage refers to the
5 e-mails that Mr. Sage provided to the police as being, quote,
6 "unsolicited," end quote. But Officer Wren testified very
7 clearly yesterday that he arrived at that scene, there were
8 dozens of witnesses, there were people all over the place; and
9 that instead of staying there and interviewing each of those
10 people individually to get their statements, he asked Mr. Sage
11 to get them and send them to him. They were solicited. And
12 then later, the District Attorney asked Officer Wren to get
13 these statements. So they were solicited both by Officer Wren
14 and by the DA. So the idea that they were unsolicited simply
15 is not the evidence.

16 And finally, as to Ms. Turnage's point about
17 Mr. Sage having been in contact with the DA six times and that
18 somehow this six times speaking with the DA is evidence of
19 some conspiracy, Mr. Sage testified that much of the reason he
20 had to speak with the DA on those occasions was purposes of
21 scheduling, when is the preliminary hearing going to be, those
22 kinds of things. So six conversations between Mr. Sage, who
23 is speaking on behalf of 15 to 20 different bicyclists, is not
24 unreasonable given the circumstances and certainly does not
25 rise to the level of outrageous conduct or anything else that
26 Ms. Turnage would have this Court believe.

27 Thank you.

28 **THE COURT:** Anything further, Ms. Turnage?

1 **MS. TURNAGE:** Yes, Your Honor.

2 In the supplemental investigative report in the
3 police report, Officer Wren testified yesterday that the
4 District Attorney asked him to interview the person who was
5 punched, and he testified that he talked with Bob Parker. And
6 then I asked him about the confusing statement that he had in
7 the supplemental report, because he stated that he had
8 interviewed Bob Parker, and then he said that he reiterated
9 what the other witnesses had said, that my client had struck
10 the cyclist in the chest with his arm, and that went to the
11 District Attorney in the supplemental report.

12 So there was that statement from the witnesses that
13 was used to send to the District Attorney, that was
14 inaccurate. There was no -- there is absolutely no evidence
15 that Mr. Lopes struck anyone with his arm before he felt the
16 helmet of Mr. Parker come into his face. There is evidence
17 that he was coming up and that he, himself -- or Mr. Chuck
18 testified that he did a high five, and Mr. Chuck was able to
19 avoid him, but that can very well be a defensive maneuver.
20 That is not anything that is indicative of personal attack.

21 And I disagree that battery and the charges that
22 were read in the complaint in the criminal proceeding are not
23 from the District Attorney's misunderstanding, through the
24 statements of other witnesses, that my client punched someone
25 out there and with his arm knocked somebody in the chest.
26 There is absolutely no evidence of that in this trial.

27 And that is what I'm speaking to, about there was no
28 eyewitness to this battery, supposed battery, because there

1 wasn't a battery. This was a clear accident. Through all of
2 the witnesses, we have established that Mr. Lopes was running
3 10 feet from the curb prior to the race and 10 feet from the
4 curb in the inner lane after the race and 10 feet from the
5 curb in the collision. And everyone knew in that bicycle club
6 that the accident happened in my client's lane at the time
7 that these cyclists had forgotten he was there, and they broke
8 out and came to the right and struck him head on.

9 And to allow -- to sit back and allow this man to,
10 quote, "get a fine and some light jail time," end of quote, to
11 cover their rear ends so they don't get sued in a civil
12 action, that is exactly what the *Sandoval* case is talking
13 about. The bar patron, they were concerned that the bar
14 patron was going to sue them in a civil lawsuit. And the
15 *Sandoval* case, the Supreme Court case said that is enough to
16 find malice -- that there is some reason to bring this man to
17 justice in a criminal proceeding other than to bring him to
18 justice. There is another motive.

19 And I submit that the evidence in this case has
20 clearly shown that the cyclists had another motive beyond just
21 wanting to see Mr. Lopes going to justice. They were upset
22 their friends were hurt in a bicycle race, they are mad that
23 he was on the course. But they understood that they had the
24 power to stop the race and to ask him to leave, either to stop
25 him from running or ask the police to come in, and they didn't
26 do it, and they understood that they were at fault for that.
27 And that is the motive that they had in seeing it through,
28 that Mr. Lopes would be criminally prosecuted.

1 **THE COURT:** I'll be back and we'll recess for a few
2 moments while I read some of my notes. I'll be back in about
3 10 minutes, 15 minutes.

4 **(Recess taken.)**

5 **THE COURT:** All right. We're on the record, outside
6 the presence of the jury.

7 The Court has reviewed the briefs and the
8 authorities submitted by counsel in support of the motion to
9 amend the complaint and in opposition to the amendments to the
10 complaint, and listened to the arguments of counsel.

11 The Court's ruling is as follows, and I'll give it
12 in pieces:

13 Regarding the intentional infliction of emotional
14 distress, there has to be outrageous conduct. Outrageous is
15 defined by the case law. It has to be conduct that is
16 completely outside the norms of normal decency. It's just not
17 conduct that's grossly negligent. It must be beyond that in
18 order to qualify for IIED.

19 In part, the same applies to NIED. The plaintiffs
20 are also seeking to amend the complaint to add a cause of
21 action for malicious prosecution.

22 This is not a case where there is a citizen's
23 arrest. I don't understand the plaintiffs' arguments and
24 statements that there were no eyewitnesses to this case. The
25 basis for that sort of escapes me. I just briefly reviewed my
26 notes.

27 Mr. Rosa said he saw the defendant with his arm
28 extended.

1 Mr. Baldwin saw Mr. O'Hara go out to the plaintiff,
2 and then he came back to the cyclists and reported what the
3 defendant had said -- excuse me -- what the plaintiff had
4 said.

5 Mr. Grusis was a rider who said he saw the defendant
6 with his arm extended, and I can't remember if it was he or
7 somebody else who gave the demonstration of the angle of his
8 arm.

9 Mr. Selzer testified to the hostile attitude of the
10 plaintiff.

11 Mr. Zuerlien, who was a marshal, advised the
12 plaintiff to get off the course, and there was a hostile
13 response, and his second comment was he was just trying to
14 keep things safe.

15 Mr. Czeszynski told the plaintiff to use the
16 sidewalk.

17 Mr. Rath, Raft or Rath -- I'm not pronouncing it
18 correctly. I think it's R-A-F-T -- was in the race
19 immediately behind Mr. Parker. He saw what happened to
20 Mr. Parker.

21 Mr. Upthegrove stated he -- or he heard somebody
22 say, "Runner, right."

23 There certainly is a lot of eyewitnesses to this
24 case. And one might have to understand the difference between
25 direct and indirect evidence or direct and circumstantial
26 evidence, but there is certainly eyewitnesses to this case. I
27 didn't go through all the witnesses. Those are the ones that
28 I just perused. So the comment that there was no

1 eyewitnesses, I don't understand that.

2 The Court denies the motion to amend the complaint.
3 The Court finds that the conduct of the defendants in this
4 case was not so outrageous as to rise to the level of
5 outrageous conduct that is defined by case law.

6 Regarding the malicious prosecution, this is not a
7 citizen's arrest. I see -- in this day and age, we should
8 encourage people to submit reports to the police and District
9 Attorney, and not discourage them. I find nothing in the
10 record to justify or to find that there was bad faith in
11 having cyclists who were at the scene, who participated in the
12 race either as participants or as helpers, like marshals and
13 people that were there for set-up, to submit reports to the
14 police who then sent the reports to the District Attorney.

15 The procedural safeguards were in place in this
16 case. The police did not make an arrest at the scene because
17 the event didn't occur in their presence. The police
18 submitted the reports to the District Attorney. The District
19 Attorney made the decision that there was probable cause to
20 justify an arrest and prosecution.

21 I cannot find that the conduct of the defendants was
22 malicious, as that term is used in the law, and was in bad
23 faith. On the contrary, I find that they were there to submit
24 to the police and to the authorities what they observed. And
25 that should be encouraged, and not discouraged.

26 For the foregoing reasons, the Court denies the
27 motion to amend the complaint.

28 As an editorial comment, I see this case as maybe

1 more simple than is being presented in this courtroom. The
2 issue in this case, as I see it, is were the race officials
3 negligent? That is, did they exercise or not exercise
4 reasonable care in allowing the race to begin when they knew a
5 runner was on the course? That's the issue. Of course, was
6 that conduct -- or if it was not reasonable care, was that a
7 substantial factor in the injuries that were -- that the
8 plaintiff incurred?

9 And the corollary is, was the plaintiff exercising
10 reasonable care when he continued to run on the course under
11 the circumstances that he knew at the time? And those
12 circumstances are that there was a pack of at least 30
13 bicyclists that he saw before the race actually started and at
14 least five laps had expired. So that means they went by the
15 runner at least five times. And they were pedaling quite
16 rapidly. It was obvious they were pedaling quite rapidly. So
17 to consider there was not a race is a little bit difficult for
18 me to understand.

19 But then there is other factors. There was the
20 hostile attitude that was testified to about the plaintiff in
21 this case. There was the comments that were made by the
22 marshals.

23 So the issue really, as I see it, is: Were the race
24 officials exercising reasonable care when they allowed the
25 race to begin, and was that -- if they did not, was this a
26 substantial factor? And was the plaintiff comparatively
27 negligent in continuing to run when he knew or should have
28 known that there was a race in progress? And was his -- if he

1 knew or should have known, but continued to run, nevertheless
2 continued to run, was his conduct a substantial factor in the
3 injuries that he sustained?

4 Those are the issues as I see it.

5 The rest of these matters are interesting, but I
6 think the case is longer and more difficult than I think the
7 real issues are in this case.

8 The jury has buzzed?

9 **THE COURT ATTENDANT:** Yes.

10 **THE COURT:** Are they all assembled?

11 **THE COURT ATTENDANT:** They are all here.

12 **THE COURT:** We'll bring them in a little bit early,
13 then. Let's bring them in at 10:25.

14 **MS. TURNAGE:** My witness is coming at 10:30.

15 **THE WITNESS:** I am right here.

16 **MS. TURNAGE:** Oh, thank you.

17 **THE COURT:** Do you need time to talk to your
18 witness?

19 **MS. TURNAGE:** Just maybe briefly.

20 **THE COURT:** Bring them in at 10:30 then.

21 **(Recess taken.)**

22 **(Proceedings continue; not transcribed.)**

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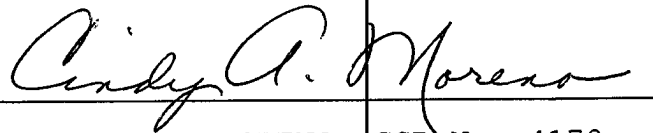
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1 STATE OF CALIFORNIA)

2 COUNTY OF ALAMEDA)

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6 I, CINDY A. MORENO, an Official Court Reporter of
7 the Superior Court of the State of California, in and for the
8 County of Alameda, do hereby certify that the foregoing is a
9 full, true, and correct transcript of my shorthand notes of
10 the testimony and proceedings had in the above-entitled
11 matter; and that said transcript includes all rulings, acts,
12 instructions or statements of the Court, also all motions,
13 objections or exceptions of counsel, and all matters to which
14 the same relate.

15
16 IN WITNESS WHEREOF, I have hereunto set my hand
17 July 16, 2008.

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22 CINDY A. MORENO, CSR No. 4178
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